MEMORANDUM OF LAW

DATE: August 7, 1995

TO: Myles E. Pomeroy, Senior Planner, Planning Department

FROM: City Attorney

SUBJECT: Residential Care Facilities

In your memorandum dated June 23, 1995, you asked our office to address several questions concerning residential care facilities. This memorandum will discuss the regulation of these facilities in light of federal and state law, and the impact of a recent United States Supreme Court decision.

BACKGROUND

In April, 1994, our office provided the Planning Department with a Memorandum of Law (Op. S.D. City Att'y 286 (1994)) addressing several issues relating to residential care facilities and the Fair Housing Act Amendments of 1988 ("FHAA"). That memorandum provides a good background to the questions you ask, and discusses in detail many of the potential challenges that can be made to local regulation of these facilities. For that reason, I have attached a copy, and will limit this Memorandum to a discussion of the specific questions you have asked.

ANALYSIS

Question One: What effect does the recent Supreme Court decision in City of Edmonds v. Oxford House, Inc., 95 DAR 6197 (1995), have on the City's ability to regulate residential care facilities?

On May 15, 1995, the United States Supreme Court issued its opinion in City of Edmonds v. Oxford House, Inc., 95 DAR 6197 (1995). The case arose out of the enforcement of a City of Edmonds, Washington, zoning ordinance. The ordinance defined family -- and thus limited household size in single-family zones -- as any number of related people, or a maximum of five (5) unrelated people. The city cited the Oxford House, a residential drug and alcohol facility located in a single-family zone, because they had more than five (5) unrelated people living there. The Oxford House claimed that their use was allowed under the Fair Housing Act which makes it "unlawful to discriminate in the sale or rental or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap." 42 U.S.C. Section 3601 et seq. The City asserted reliance upon 42 U.S.C. Section 3607(b)(1) which exempts from

the Fair Housing Act "any reasonable local, State, or Federal restriction regarding the maximum number of occupants permitted to occupy a dwelling."

The issue before the Supreme Court was a very narrow one, simply put: Does the City of Edmonds' definition of family constitute an "occupancy restriction" under 42 U.S.C. Section 3607(b)(1)? The Court held that the city's definition did not constitute an occupancy restriction under the federal statute because it did not cap the number of people who could live in a dwelling, but merely capped the number of unrelated people who could live in a dwelling. Edmonds, 95 DAR at 6200. Since the restriction was not a maximum occupancy restriction, the ordinance was not exempt from the Fair Housing Act. The Court did not address whether the City of Edmonds' ordinance was discriminatory, merely stating: "It remains for the lower courts to decide whether Edmonds' actions against Oxford House violate the FHA's prohibitions against discrimination." Id. at 6200.

Since the holding in the Edmonds case was so narrow, its effect on the City of San Diego is negligible. The case only verifies something that was already known; that the imposition of a conditional use permit ("CUP") on a residential care facility with more than six (6) beds is not a maximum occupancy restriction, and is therefore subject to the nondiscrimination provisions of the FHAA.

Question Two: Can the City require residential care facilities to notify community planning groups before they begin operation in an area within which they may legally locate by right?

Two federal cases have addressed the issue of neighbor notification. In Potomac Group Home Corporation v. Montgomery County, Maryland, 823 F. Supp. 1285 (D. Md. 1993), the court reviewed an ordinance that required prospective providers of group homes to notify neighbors and civic organizations prior to beginning operation. The county argued that the regulation was intended to promote a dialogue between the group home providers and the neighborhood, so that "the home can eventually become part of the community." Id. at 1296.

The court struck down the notification requirement, saying that it was "facially invalid." Id. In response to the county's claim that the purpose of the notification was to ensure that the neighbors and the homes can address problems before they arise, the court said, "a purportedly benign purpose of a facially discriminating ordinance is irrelevant to a determination of the lawfulness of the legislation." Id.

Another federal case, Larkin v. State of Michigan 883 F. Supp. 172 (E.D. Mich. 1994), also involved a challenge to a neighbor notification requirement. In that case, state law required city councils to provide

residents whose property lines were within 1,500 feet of a proposed facility notice of the intended use. This court, like the court in Potomac, struck down the notification requirement, saying it was a violation of the FHAA. The court stressed that the FHAA was intended to prohibit actions that would limit the ability of handicapped people to live in the residence of their choice. They found that there was no rational basis for either the notification provision or the separation requirement.

While there are only two cases in which notification requirements were challenged, the requirements were struck down in both. That result is consistent with other federal cases which stress that any requirement imposed only on residential care facilities, and not on other uses, establishes a prima facia case of discrimination. Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450 (D.N.J. 1992); Marbrunak, Inc. v. City of Stow, Ohio, 974 F.2d 43 (6th Cir. 1992). Like the notification requirements above, the proposal to require residential care facilities to notify community planning groups before they operate in an area within which they may legally locate by right would probably not survive a legal challenge. The only legal way to accomplish neighborhood notification would be to require it of every use in the zone. Even then, however, a challenge could probably be made claiming that waiving this requirement would be a reasonable accommodation, and failure to do so would be discrimination. (42 U.S.C. Section 3604(f)(3)(b) - discrimination includes refusal to make reasonable accommodations in policies.) The City could end up with a situation where every use except residential care facilities would be required to notify community planning groups. The best approach would be to not adopt a requirement that the community planning groups be notified.

Question Three: Would a change in state law restoring control over facilities with six or fewer beds to local land use authorities conflict with the Fair Housing Act Amendments ("FHAA") or any provisions of state or federal law?

The short answer is that while restoring control over facilities with six (6) or fewer beds to local authority would not in itself conflict with the provisions of the FHAA, requiring conditional use permits, or otherwise regulating these facilities in a way that other uses are not, probably would. Further, any state law that allowed cities to regulate these facilities might be invalid.

Recent amendments to the California Fair Employment and Housing Act ("FEHA") provide residential care facilities with protection at least as great as the FHAA. Further, any provision in state law which conflicts with these protections is invalid. California Government Code section 12955.6, provides:

Nothing in this part shall be construed to

> afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 . . . . Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.

Any change in state law allowing cities to require CUPs for residential care facilities with fewer than six (6) beds would probably be invalid under the provisions of the Government Code section cited above, and any imposition of CUPs on such facilities would, as the attached 1994 Memorandum of Law makes clear, probably be prohibited by the FHAA. Because federal law mandates how these facilities are treated, any legislative change to allow more regulation must be made on the federal level.

Question Four: Can the City make the permit approval process for residential care facilities more restrictive in areas where such facilities are overconcentrated?

The House report on the FHAA (H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173) states:

> The Act is intended to prohibit the application of special restrictive covenants, and conditions or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community. (Emphasis added.)

With this legislative history in mind, the City needs to be very careful any time they place restrictions on residential care facilities that are not placed on other types of living arrangements.

Restricting approval based upon overconcentration of facilities is somewhat analogous to imposing minimum separation requirements between facilities. Several federal cases have addressed these requirements. The first case to address separation requirements was Familystyle v. St. Paul, 728 F. Supp. 1396 (D. Minn. 1990). In Familystyle, the court upheld a spacing requirement of 1,320 feet between facilities, finding that disbursal promoted integration and assimilation. The three cases that have addressed this issue since Familystyle, however, have all struck down separation requirements:

1. In Larkin v. State of Michigan, 883 F. Supp. 172 (E.D. Mich. 1994), the court found no rational basis for a 1,500 foot separation requirement, despite claims by the defendant that the purpose

of the restriction was to ensure that no one area or neighborhood becomes saturated with similar institutions;

2. In U.S. v. Village of Marshall, Wis., 787 F. Supp. 872 (W.D. Wis. 1991), the court invalidated a 2,500 foot spacing requirement, and found that the city violated the FHAA by not granting an exception (not providing reasonable accommodation). This case is interesting because the court addressed the issue from a different perspective, essentially holding that even if the separation requirement itself is not a violation, enforcing it could be seen as a failure to "provide reasonable accommodation," and thus would be discrimination;

3. In Horizon House Developmental Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683 (E.D. Pa. 1992), the court held that the city's 1,000 foot separation requirement violated the FHAA. This case could potentially be distinguished by the fact that the court found intentional discrimination, and there was no justification in the legislative record. The court in this case pointed out, however, that the Attorneys General of North Carolina, Kansas and Delaware had ruled that their respective separation requirements (ranging from 1,000 feet to 5,000 feet) were invalid under the FHAA.

While separation requirements are not exactly the same thing as restricting approval based upon overconcentration, they both have the effect of limiting the ability of disabled people to live "in the residence of their choice." Because of this, any court that reviews such an approach would likely find that the restriction had a discriminatory impact. Once discriminatory impact is shown, the burden would be on the City to prove that the restriction was necessary to achieve a compelling governmental interest, and that this interest outweighs any discriminatory effect. (Cal. Gov't Code Section 12955.8.) If the City can make this showing, requiring a more restrictive permit approval process for residential care facilities in overconcentrated areas would survive challenge. The bottom line is that a fairly tough burden will be on the City to justify treating residential care facilities different than other uses.

CONCLUSION

Regulation of residential care facilities is a difficult area. On one hand these facilities are seen as businesses located in residential areas. On the other hand, these homes are often necessary to adequately care for the handicapped or disabled. The cases which interpret the FHAA increasingly hold cities to higher standards, and require more and more accommodations be made for residential care facilities. As the attached Memorandum of Law from our office makes clear, the City must carefully consider any requirements placed upon residential care facilities, and should be flexible in its zoning and permit process with regard to these types of uses. If you have any comments or need further information, please let us know.

JOHN W. WITT, City Attorney
By
Douglas K. Humphreys
Deputy City Attorney

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Attachment
ML-95-53